Office - Supreme Court, U.S.
FILED
JUN 26 1984
ALEXANDER L. STEVAS
CLERK

(9)

No. 9, Original

In the Supreme Court of the United States

October Term, 1983

UNITED STATES OF AMERICA,
Plaintiff,

vs.

STATES OF LOUISIANA, TEXAS,
MISSISSIPPI, ALABAMA
AND FLORIDA
(MISSISSIPPI BOUNDARY CASE)
Defendants.

EXCEPTIONS AND BRIEF OF THE STATE OF MISSISSIPPI

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EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER AND BRIEF OF THE STATE OF MISSISSIPPI

INTRODUCTION

The issue in this proceeding is whether the Mississippi Sound is inland waters under the Submerged Lands Act 43 U.S.C. §1301, *et seq.* The Special Master in his Report filed April 9, 1984 found that the waters of the Sound constitute inland waters of the States of Mississippi and Alabama and that title to the underlying lands belonged to the States. In particular, the Master found the Sound qualified both as a historic bay and a juridical bay under Article 7 of the Geneva Convention on the Territorial Sea and Contiguous Zone. With these two conclusions, the State of Mississippi fully agrees.

Mississippi's exceptions to the Report relate to the alternative bases asserted in support of its claim: that Mississippi Sound qualifies as a juridical bay under Article 7 regardless of the characterization of Dauphin Island as a "mainland headland"; that Mississippi Sound qualifies as inland waters under Article 4 of the Convention on the Territorial Sea and Contiguous Zone and prior United States practice of enclosing as internal waters those waters between the mainland and offlying islands which were so closely grouped that no entrance exceeded ten nautical miles in width; and that Mississippi's southern boundary was established and approved by Congress along the southern coast of the barrier islands in the Mississippi Enabling Act (1817).

Mississippi takes these exceptions to the Special Master's Report for the sole purpose of preserving its theories which it believes further supports the Special Master's ultimate findings.

EXCEPTIONS

The State of Mississippi excepts to the following findings and conclusions in the Special Master's Report:

1. The United States has not adopted the straight baseline method authorized by Article 4 of the Convention. (Report, p. 7).

2. Judicial deference is appropriate with respect to Mississippi's Article 4 claim to the Mississippi Sound and must be judged by present United States policy respecting straight baselines. (Report, p. 7).

3. Mississippi further excepts to the Special Master's failure to find Mississippi Sound a juridical bay regardless of the treatment given to Dauphin Island as a mainland headland. (Report, p. 18).

4. The State also excepts to the Master's conclusion that he was foreclosed from finding that Mississippi's Act of Admission (1817) on its face fails to establish the State's southern boundary along the southern coast of the barrier islands. (Report, pp. 33-34).

SUMMARY OF ARGUMENT

1. Mississippi bases its straight baseline claim to Mississippi Sound as inland waters on the policies and practice of the United States. In his report the Special Master found Mississippi Sound to be a historic bay based on the fact that the United States had traditionally asserted and maintained dominion over the area with the acquiescence of foreign governments. In particular, he found that the United States had adopted a policy and practice of enclosing waters between the mainland and offlying islands which were so closely grouped that no entrance exceeded 10 nautical miles as inland waters. (Report, pp. 41-44, 47-54). Such a method of drawing straight baselines to a string of offshore islands has been characterized by this Court as a "fictitious bay" concept. (*United States v. Louisiana, et al.*, 394 U.S. 11, 72, n. 96). Despite these findings, the Special Master concluded the State's claim is to be judged by present United States position and that the United States has not expressly adopted Article 4 of the Convention.

Mississippi Sound was recognized under international law as internal waters of the United States prior to the adoption of the Convention in 1961. To deny the effect of the prior policy and practice of the United States would result in a disposition of the territory of the State of Mississippi and the United States contrary to Article IV, §§3 and 4 of the Constitution of the United States.

The fact that Mississippi has asserted alternative bases in support of its inland water claim should not vitiate its claim under Article 4 of the Convention. Moreover, by relegating the State's proof of straight baselines to treatment under a historic bay analysis, the Master imposes

upon the State an additional burden of showing the continuous exercise of sovereignty and dominion, notice, and acquiescence by foreign powers. Under these circumstances, the State of Mississippi submits that deference to the United States' refusal to employ straight baselines to enclose Mississippi Sound is inappropriate and that Article 4 is an appropriate means of securing the title and territory of the State of Mississippi.

2. Mississippi asserts that Mississippi Sound qualifies as juridical inland waters under Article 7 of the Convention regardless of the treatment of Dauphin Island as an extension of the mainland. This proposition is confirmed by a careful analysis of Article 7, its *traveaux preparatoires*, and opinions of this Court. From these authorities it is clear that the presence of islands along a mainland coast may have a significant influence on the intervening waters by creating natural entrance points and confirming the existence of indentations and landlocked water. Contrary to the argument of the United States that analysis under Article 7 is largely subjective, the *traveaux* clearly indicates the insistence of the drafters of Article 7 upon a clear and precise method of establishing the existence of a juridical bay. By carefully applying Article 7, disputes regarding "well-marked indentations" and "land-locked" waters are reduced to empirical analyses.

3. Mississippi contended before the Master that its boundary description contained in its Enabling Act (1817) expressly and by implication establishes the State's boundary along the southern coast of the barrier islands. The State believes that the boundary calls are sufficiently precise as to leave no doubt that the Mississippi Sound was to be included within that boundary. If that be the case, the Submerged Lands Act, 43 U.S.C. §1301, *et seq.*, specifically confirms Mississippi Sound as inland waters and authorizes

an extension of its boundary up to three miles in the Gulf. At an earlier stage of this litigation, *United States v. Louisiana, et al.*, 363 U.S. 1 (1960), the United States, citing *Pollard's Lessee v. Hagan*, 3 How. 212, conceded Mississippi Sound as inland waters of the State and that the underlying lands passed to the State upon its entry into the Union. *Pollard* had recognized the States' rights to the beds of inland waters within their respective boundaries. While the Court concluded that the boundary call "including all islands within six leagues of the shore" did not purport to create a territorial sea at that distance where no islands existed, that conclusion is fully consistent with a boundary line drawn around islands where they do exist. A finding to the contrary would ignore the plain language of the boundary calls without resolving the location of the boundary. If the Enabling Act fixes no boundary except by implication, then the boundary may be established by reference to extrinsic fact (*Missouri v. Kansas*, 313 U.S. 78 (1909)), and the case remanded to the Special Master for additional findings, unless the Court finds in favor of the State on other grounds.

ARGUMENT

I. JUDICIAL DEFERENCE TO THE UNITED STATES' DISCLAIMER OF ARTICLE 4 STRAIGHT BASELINES IS INAPPROPRIATE IN THE PRESENT CASE.

The Special Master found in his Report that the United States has not adopted the straight baseline method authorized by Article 4 of the Convention on the Territorial Sea and Contiguous Zone. He concluded:

> I am therefore convinced that the adoption of the 24-mile closing line together with the semi-circle test in place of the ten mile rule represents the *present position* of the United States and that this has resulted in no contraction of the recognized territory of the states of Alabama and Mississippi for the reasons that will hereafter appear, and therefore that Article 4 of the Convention does not apply. (Report, p. 7). [Emphasis supplied].

In reaching this conclusion he explained:

> The states, however, contend that the United States has traditionally claimed as inland waters sounds and straits lying behind islands where none of the entrances between islands or islands and the mainland exceeds ten miles in width, and that this amounts to the adoption of a system of straight baselines. It is apparently true that prior to the ratification by the United States of the Geneva Convention (March 24, 1961) it adhered to the so-called 'ten mile rule' . . . . (Report, pp. 5-6).

The Special Master subsequently found in the context of Mississippi's historic bay claim:

> On March 24, 1961 the United States ratified the Geneva Convention, which as noted in *United States v. California, supra,* represented a departure from its previously held position; therefore the material quoted above represents the publicly stated position of the United States from 1903 (Alaska Boundary Arbitration) to that date. *Under that position, there is no doubt that Mississippi Sound constituted inland waters, as none of its mouths exceeds ten miles in width.* (See Stipulation No. 6). (Report, pp. 53-54). [Emphasis supplied].

The "ten-mile rule" referred to by the Special Master was recognized by several nations prior to the effective date of the Convention (September 10, 1964).[1] Under that rule waters enclosed between the mainland and offlying islands which were so closely grouped that no entrance exceeded 10 nautical miles in width were deemed inland waters. The rule was derived from the supposed analogy with bays and is frequently alluded to as a "fictitious bay" concept.[2]

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1. The United States ratified the Convention on March 24, 1961. The Convention, however, did not go into effect until the requisite number of nations had ratified it.

2. In *United States v. Louisiana,* 394 U.S. 11 (1969), the Court noted:

> [W]e held that the choice of whether to employ the concept of a 'fictitious bay' was that of the Federal Government alone [citation omitted]. That holding was, of course, consistent with the conclusion that the drawing of straight baselines is left to the Federal Government, for a 'fictitious bay' is merely the configuration which results from drawing straight baselines from the mainland to a string of islands along the coast. (p. 72, n. 96).

In a letter, dated June 6, 1972, Jonathan I. Charney, Chief of the Marine Resources Division, U.S. Department of Justice, replied to a request for comments on proposed lease maps for the Gulf of Mexico. The purpose of the review was to ascertain whether the maps conformed with the baseline used on the Law of the Sea Task Force Charts. He explained:

> The only place where a problem arises is found on the Mobile Leasing Map. The difference between the leasing map and the Task Force documents raises the question as to the status of Mississippi and Chandeleur Sounds. Although the State Department takes the position that Chandeleur Sound is for the most part high seas, *in the early part of our litigation with Louisiana the Department of Justice took the position that it was internal waters on the theory that it was a fictitious bay.* Although the theory was discredited by the Supreme Court in 1965, *United States v. California*, 381 U.S. 139 at 170-172, it was decided that, in the interest of comity with the State, it would be better not to change our litigation position. (Exhibit M-101). [Emphasis supplied].

The letter notes that the United States entered into a stipulation with Louisiana in 1971 that it would not claim that Chandeleur Sound was on the outer continental shelf. The letter continued:

> No such stipulation or reliance has taken place with respect to the rights of Mississippi Sound and, if pressed, I would assume that we would take the position that the limit of the states' rights is the 3-mile limit shown on the Task Force Documents. *However, due to the status of our other litigation, we believe that we should not litigate this question now.* (Exhibit M-101, p. 2). [Emphasis supplied]

While the Master clearly recognizes the treatment of areas such as Mississippi Sound under prior United States policy and practice, he declined to give effect to that policy in the matter *sub judice*. The Convention, he notes, is controlling in defining inland waters under the Submerged Lands Act, and under the Convention waters between islands or islands and the mainland become internal by application of Article 4 or the 24 mile closing line and semicircle test of Article 7. The United States, however, has disclaimed the use of straight baselines under Article 4.[3] Based on the Master's subsequent findings regarding the ten-mile rule employed by the United States, it is obvious that he intended his conclusion regarding treatment of straight baselines should be limited to the present policy of the United States.

The present policy of the United States regarding straight baselines and offshore islands did not burst forth fully developed like Athena from the head of Zeus. There was no abrupt departure from the ten-mile rule following the ratification of the Convention on March 24, 1961. The Convention was not adopted until September 10, 1964 just two months before oral argument in *United States v. California*, 381 U.S. 139 (1965). Moreover, the United States did not seek to be relieved from its concession regarding Louisiana's offshore islands until *United States v. Louisiana*, 394 U.S. 11 (1969), and even then it declined to withdraw its concession regarding Chandeleur Sound. During that litigation it asserted Mississippi Sound was inland waters, and not until April 1971 did the United States make

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3. The fact that the United States may have used the terms "ten-mile rule" and "fictitious bay" rather than "straight baselines" is of little significance. The simple fact remains that the method employed by the United States was recognized as a system of straight baselines under international law following the decision in the *Fisheries Case*, I.C.J. 1951.

its first public disclaimer in regard to Mississippi Sound, more than ten years after the Convention. A further review of the positions of the United States before this Court is reflective of the gradual change in policy.

The Court's adoption of the Geneva Convention for defining the term "inland waters" as used in the Submerged Lands Act together with the deference accorded the United States' position provided the incentive for the Executive Branch eventually to abandon the ten-mile rule. In *United States v. California, supra,* the United States contended that the definition of the term "inland waters" should be governed by the policy of the United States on May 22, 1953, the date of the enactment for the Submerged Lands Act. Similarly, the United States argued that California could not rely upon the straight baseline method to extend its territorial boundaries beyond their traditional limits. The Court stated:

> . . . California may not use such baselines *to extend our international boundaries beyond their traditional limits against* the expressed opposition of the United States. The national responsibility for conducting our international relations must be accommodated with the legitimate interests of the States in the territory over which they are sovereign. Thus a contraction of a *State's recognized territory imposed by the Federal Government in the name of foreign policy would be highly questionable.* But an extension of state sovereignty to an international area by claiming it as inland waters would necessarily also extend national sovereignty, and unless the Federal Government's responsibility for questions of external sovereignty is hollow, it must have the power to prevent states from so enlarging themselves. (p. 168). [Emphasis supplied].

There is no indication in the opinion of this Court that the United States had receded from its use of the ten-mile rule for enclosing nearby islands. To the contrary, the United States noted in its Brief as follows:

> California attempts to analogize the Santa Barbara Channel to Chandeleur and Breton Sounds, in Louisiana, which the United States has recognized as inland waters. For present purposes, it is enough to observe that the widest entrances to Chandeleur and Breton Sounds are six miles between Ship Island and the northernmost tip of the Chandeleur Islands. Thus, *our concession as to Chandeleur and Breton Sounds involved no breach of the ten-mile limit.* (Brief of the United States, p. 113). [Emphasis supplied].

The Court further noted that the openings at the ends of Santa Barbara Channel were 11 miles and 21 miles, clearly in excess of the ten-mile rule. The United States contrasted Santa Barbara Channel with Chandeleur Sound as a "strait which serves as a useful route of communication between two areas of open sea." That, of course, was a limitation on the application of the ten-mile rule for straits and sounds. Those which gave access only to an inland sea as opposed to connecting two areas of the high seas are treated as internal waters provided none of their entrances exceeded ten miles. (See Letter of Acting Secretary of State James E. Webb, Paragraph (f), dated November 13, 1951, Exhibit J-106). The Court concluded: "The United States has not in the past claimed the Santa Barbara Channel as inland waters and opposes any such claim now." (p. 172).

Four years later in *United States v. Louisiana,* 394 U.S. 11 (1969), the United States seizing upon the deference accorded in the California case asserted that straits and

sounds formed in part by offshore islands constitute inland waters under the Convention only by drawing straight baselines. The decision it maintained rests in the sole discretion of the Federal Government and that it has not adopted that option. That disclaimer it asserted was conclusive of the matter under the California decision. (381 U.S. 1, at pp. 67 and 72).

The Court in its discussion of Article 4 noted:

> This latter area [Chandeleur and Breton Sounds] is not in dispute for the United States, while asserting that the sounds are not necessarily inland waters under the Convention, has conceded that they belong to Louisiana. That concession was made at an early stage of this litigation . . . and the United States has decided not to withdraw it despite the subsequent ratification of the Convention. (394 U.S. 1, 66).

While declining to bind the United States by its previous concession that the areas between the Louisiana mainland and *all* its offshore islands were "sufficiently enclosed to constitute inland waters," (363 U.S. 1, p. 68, n. 108), the Court indicated that the Federal Government's discretion under Article 4 of the Convention was not absolute. In that regard, the Court stated:

> It might be argued that the United States' concession [that Chandeleur Sound was inland water of the State of Louisiana] reflected its firm and continuing policy to enclose inland waters within island fringes. It is not contended at this time, however, that the United States has taken that posture in its international relations to such an extent that it could be said to have, in effect, utilized the straight baseline approach sanctioned by Article 4 of the convention. *If that had been the consistent official international stance*

> *of the Government, it arguably could not abandon that stance solely to gain advantage in a lawsuit to the detriment of Louisiana.* (p. 72, n. 97). [Emphasis supplied].

The Court expressly left open the circumstances under which the Federal Government's refusal to employ straight baselines might be questioned:

> We do not intend to preclude Louisiana from arguing before the Special Master that, until this stage of the lawsuit, the United States has actually drawn its international boundaries in accordance with the principles and methods embodies in Article 4 of the Convention on the Territorial Sea and Contiguous Zone. (p. 74).

In this context the Court stated:

> The Convention was, of course, designed with an eye to affairs between nations rather than domestic disputes. But, as we suggested in United States v. California, it would be inequitable in adopting the principles of international law to the resolution of a domestic controversy, to permit the National Government to distort those principles, in the name of its power over foreign relations and external affairs, by denying any effect to past events. (p. 77).

It further admonished:

> It is one thing to say that the United States should not be required to take the *novel,* affirmative step of *adding to its territory* by drawing straight baselines. It would be quite another to allow the United States to prevent recognition of a historic title which may already have ripened because of *past* events but which is called into question for the first time in a

> domestic law suit. The latter, we believe would approach an impermissible contraction of territory against which we cautioned in United States v. California. (p. 77). [Emphasis supplied].

The Court in these cases has identified certain closely related factors to be considered in determining the appropriateness of judicial deference for Article 4 claims. These considerations include: Whether adoption of straight baselines would extend the international boundaries of the United States beyond their traditional limits; whether adoption of a straight baseline method would be truly novel; and whether failure to employ straight baselines would result in a contraction of a State's recognized territory.

Mississippi contends that judicial deference to the United States' disclaimer that it has not employed straight baselines is inappropriate in the context of Mississippi Sound. In view of the Master's subsequent findings, it is clear that the United States employed the ten-mile rule for certain straits and sounds, that such method of delimiting inland waters was consistent with international law stated in the *Fisheries Case*, I.C.J. 1951, and that the water areas so enclosed became the territory of the United States and the State of Mississippi protected by Article IV, Sections 3 and 4 of the Constitution of the United States. Thus, the use of straight baselines along the Mississippi barrier islands is neither novel with the Federal Government nor would it enlarge the traditional international boundaries of the United States. Likewise, it may well result in a contraction of the State's recognized territory. Moreover, the United States relying upon the ten-mile rule conceded Mississippi Sound to be inland waters over a quarter century ago and did not publicly recede from that position until 1971, some ten years after

the ratification of the Convention. Even at that stage, the United States did not inform the State of Mississippi of any disclaimer. To the contrary, the United States appears to have discouraged the publication of any charts which might disclose the change in policy respecting the Sound. (Exhibit M-101). Not until the publication of the OCS Protraction Diagram in 1977 depicting the enclaves of high seas within Mississippi Sound did the State of Mississippi become aware of the policy change by the Federal Government. The Special Master concluded that the attempt by the United States to rescind its concession as to Mississippi Sound as inland waters was suspect. He found:

> . . . [U]nder the circumstances it is difficult to accept the disclaimer as entirely extrajudicial in its motivation. It would appear to be more in the nature of an attempt by the United States to prevent recognition of any preexisting historic title which might have already ripened because of past events but which was called into question for the first time in a domestic lawsuit. (Report, p. 47).

The Special Master accepted the United States' disclaimer and deferred to its position that Article 4 did not apply. It is significant that the Master's deference to the discretion of the Federal Government was in part predicated upon his finding that:

> . . . this has resulted in no contraction of the recognized territory of the States of Alabama and Mississippi *for reasons that will hereafter* appear . . . . (Report, p. 7). [Emphasis supplied].

That conclusion is most perplexing. The Special Master, in effect, concludes Article 4 should not be applied because no contraction of Mississippi's territory has occurred

but because of his subsequent findings that Mississippi Sound is a juridical bay under Article 7 and constitutes a historic bay under applicable principles of international law. However, the fact that Mississippi has asserted alternative bases in support of its inland water claim should not vitiate its claim under Article 4 of the Convention nor should it dissuade the Master from making findings on each alternative theory.

For the foregoing reasons, Mississippi submits that judicial deference to the Federal Government's refusal to employ Article 4 straight baselines to enclose Mississippi Sound as inland waters is inappropriate and that Article 4 is a proper means of preserving the title and territory of a State.

II. MISSISSIPPI SOUND QUALIFIES AS INLAND WATERS REGARDLESS OF THE TREATMENT OF DAUPHIN ISLAND AS A MAINLAND HEADLAND.

In his Report, the Special Master concluded that Mississippi Sound qualifies as a juridical bay within the meaning of Article 7 of the Convention on the Territorial Sea and Contiguous Zone. His conclusion was premised upon the findings that Isle au Pitre, Louisiana and Dauphin Island, Alabama are extentions of the mainland forming western and eastern headlands to the Sound. With respect to Mississippi's alternative theory, the Master noted:

> The states contend that even if Dauphin Island is not considered a part of the mainland, then the eastern natural entrance point of Mississippi Sound is Cedar Point, and therefore the total closing line distance is still less than 24 nautical miles (Stipulation Nos. 1 and 7) . . . . In view of my finding as to Dauphin Island, it is unnecessary for me to pass upon that

contention. Suffice it to say that in my judgment, Mobile Bay and Mississippi Sound are separate bodies of water joined by a strait located between Dauphin Island and Cedar Point. (Report, p. 18, n. 7).

While Mississippi agrees with the Master's findings regarding Isle au Pitre and Dauphin Island, it believes the same conclusion may be demonstrated by a straight forward application of the provisions of Article 7 without regard to the treatment of Dauphin Island as an extension of the mainland.

The United States, eschewing the empirical assistance provided by Article 7 in favor of subjective characterization, insists Mississippi Sound is not a "well-marked" indentation at all but merely a fringe of islands along a relatively straight mainland coast.[4]

Mississippi, however, contends that the language of Article 7 provides an objective meaning for the terms

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4. The difficulty with subjective opinion is apparent. For example, in its brief in *U.S. v. Louisiana* (1969), the United States distinguished the treatment of Mississippi Sound as inland waters from the island configurations along the Louisiana coast by characterizing the Mississippi barrier islands as "islands in the mouth of an indentation." The United States argued: "Louisiana cites a variety of materials to support its contention that a bay may be created by the presence of islands in the open sea. Many of them, however, relate to islands in the mouth of an indentation—an entirely different matter. Mississippi Sound, referred to by Louisiana, is such a situation." (Exhibit J-66, p. 30). In the present case the United States has abandoned its earlier conclusion and now denies that Mississippi Sound constitutes an indentation at all. Dr. Bowett, who testified on behalf of the United States, asserted that the distinction between an "indentation" and a "mere curvature" in Article 7(2) is a matter of subjective judgment upon which individuals would be likely to have a difference of opinion. (TR. 1850, ll. 20-25). However, even Dr. Alexander, Geographer for the State Department, conceded that the Sound is a well-marked indentation if the entirety of the Sound is considered rather than isolated segments. (TR. 2242). Professor Reisman, on behalf of Mississippi, testified that the area constituted a pronounced indentation to which Article 7 applied. (TR. 2043).

"indentation" and "land-locked waters," and that its meaning is confirmed by the *travaux preparatoires*, the writings of publicists, and the opinions of this Court.

Article 7 provides *inter alia*:

> 1. This article relates only to bays the coasts of which belong to a single State.
>
> 2. For purposes of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.
>
> 3. For the purpose of measurement, the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water marks of its natural entrance points.

The language of Article 7(2) originated in the proposal of Garcia Amador, the Cuban representative at the 317th Meeting of the Seventh Session of the International Law Commission in 1955. Paragraph 1 of his proposed text provided:

> For purposes of these regulations, a bay is a well-marked indentation, whose penetration inland is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. (Y.B. ILC, 1955, Vol. I, p. 206).

His definition of "bay" was inspired by the conclusions which the United Kingdom had submitted in *United King-*

dom v. Norway, ICJ (1951).[5] He modified the British submission by including the words "as to contain landlocked waters"—an idea taken from the dissenting opinion of Justice McNair in the same case.

A. The Semi-Circle Test.

Amador's proposal for Article 7(2) occasioned concern among several members of the International Law Commission respecting the indefinite and imprecise choice of language. Professor J.P.A. Francois, Special Rapporteur for the ILC's work on the Regime of the Territorial Sea, contrasted the objective criteria of his draft of Article 7 with the geographical factors of Mr. Amador's proposal. The Rapporteur observed:

> The latter [Amador's proposal] provided a definition which, when applied, might be found to be a *petitio principii*. Moreover, the expression 'landlocked waters,' even in the sense ascribed to it by the International Court of Justice in the Fisheries Case, was imprecise. (Y.B. ILC, 1955, Vol. I, p. 207).

Likewise, Mr. Sandstrom, the Swedish representative, voiced a similar criticism of Paragraph 1 of the Amador proposal. He pointed out that it was difficult to formulate a juridical definition based on geographical factors and that he considered the definition of Paragraph 1 of Mr. Amador's text to be, if not a *petitio principii*, at any event extremely vague. (Y.B. ILC, 1955, Vol. I, p. 209). The representative of the United Kingdom, Sir Gerald Fitz-

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5. The conclusion of the United Kingdom stated:

The definition of a bay in international law is a well-marked indentation whose penetration inland is in such proportion to the width of its mouth as to constitute the indentation more than a mere curvature of the coast. (ICJ Reports, 1951, p. 122).

maurice, noted that while Amador's definition of a bay contained a good general description possibly helpful to laymen, it did not provide a precise definition. He accordingly proposed that the definition of a bay be clarified by adding the following sentence:

> An indentation shall not, however, be regarded as a bay unless its area is as large or larger than the semi-circle drawn on the entrance of that indentation. (Y.B. ILC, 1955, Vol. I, p. 210).

That amendment supplied an objective content to the definition by providing a technical means of verifying the existence of a bay. The amendment together with the definition proposed by Amador was adopted by the Commission (ILC), approved by the Law of the Sea Conference (LOS), and subsequently incorporated as a part of Article 7(2) of the Convention. (Y.B. ILC, 1955, Vol. I, p. 211; U.N. Conf. LOS, 1958, Vol. II, pp. 268-69).

The ILC was created by the United Nations General Assembly to study and encourage the "progressive development of international law and its eventual codification." The term "Codification of International Law" referred to "the more precise formulation and systemization of the rules of international law in fields where extensive state practice, precedent and doctrine already existed." (See Strohl, *International Law of Bays*, p. 214). In this context, Mr. Amador's draft was an appropriate definition in that it adopted the authoritative language of the International Court of Justice in the *Fisheries Case*. The ILC beginning with that language formulated precise technical terms embodying the subjective geographical criteria for a bay. Properly viewed, the definition of a bay under Article 7(2) employs the "semi-circle test" and the related concept of "natural entrance points" to give content and

meaning to the vague and imprecise geographical terms upon which Amador's proposal relied.

The semi-circle test was not entirely new. At the suggestion of the Special Rapporteur a committee of experts met at the Hague in 1953 to examine questions of a technical nature raised during the Commission's meeting of the previous year. In its report, the committee of experts addressed the following questions:

> Accepting the low-water line system as a general rule for measuring the territorial sea, while in bays a straight line across the bay should circumscribe the 'inland waters.' What territorial observations can be made to:
>
> A. *the definition of a bay as opposed to a mere curvature* in the coastline?
>
> * * *
>
> (U.N. Document A/CN. 4/61/Add. 1). [Emphasis supplied].

In response to the question posed, the Committee stated:

> A. (1) A bay is a bay in the juridical sense, if its area is as large as, or larger than that of a semi-circle drawn on the entrance of that bay. Historical bays are excepted; they should be indicated as such on the maps.
>
> A. (2) If a bay has more than one entrance . . . this semi-circle should be drawn on a line as long as the sum-total of the length of the different entrances.
>
> A. (3) Islands within a bay should be included as if they were a part of the waters of the bay.

The Committee and the Special Rapporteur, who incorporated the report in his 1954 draft of Article 7, thus

understood the semi-circle test as a technical method of distinguishing a bay from a "mere curvature of the coastline." It was, of course, with this understanding that Mr. Fitzmaurice made his amendment to Paragraph 1 of Mr. Amador's text.

Further evidence of the significance of the semi-circle test is provided by the 1958 United Nations Law of the Sea Conference (LOS). The ILC draft of Article 7 was referred to the First Committee of the Conference. During consideration of the draft convention, the United States proposed an amendment to Article 7(1). The amendment together with the United States' comment further confirm the function to the semi-circle test. The amendment provided:

> For purposes of these Articles a bay is a well-marked coastal indentation with an area at least equal to that of a semi-circle whose diameter is a line drawn across the mouth of the indentation; this is the closing line of the bay and constitutes the baseline. (U.N. Conf. LOS, Vol. III, p. 241).

In its accompanying comments, the United States stated:

> The words *'contain land-locked waters and constitute more than a mere curvature of the coast'* in the first sentence of the draft article *lack legal precision and are unnecessary in view of the requirement relating to the area of a semi-circle.* (U.N. Conf. LOS, 1958, Vol. III, pp. 241-42). [Emphasis supplied].

The gloss given by the United States reflects the general understanding that if a body of water meets the semi-circle test it will constitute more than a "mere curvature" and enclose landlocked waters.

Robert Hodgson and Lewis Alexander, the former and incumbent Geographers for the State Department, state in reference to the phrase "well-marked indentation" as follows:

> A minimum objective test of the status is essential and is furnished with the Convention's semi-circular rule *which determines the point.* (*Toward an Objective Analysis of Special Circumstances,* p. 4, Exhibit J-5). [Emphasis supplied].

They further state:

> The concept of land-locked [waters] is imprecise and as a result, may call for subjective judgments. The semi-circular test. . . may relate also to the character of the waters being land-locked as well as to the determination of a well-marked indentation. (Exhibit J-5, p. 6).

Derek Bowett, who testified on behalf of the United States on the application of Article 7, stated that the semi-circle test was intended to verify the existence of a "well-marked indentation" as opposed to a "mere curvature" of the coastline.[6] (TR. pp. 1826, 1857). His testimony in this respect is consistent with the *traveaux* and general understanding of the function of the semi-circle test.

The Special Master in his Report concluded that Mississippi Sound met the semi-circle and the 24-mile closing line tests. He found that there was little applicable authority to assist him in determining whether in the language of Article 7(2) Mississippi Sound constituted a "well-marked indentation whose penetration is in such

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6. Derek Bowett is Professor of International Law at Cambridge University and author of *The Legal Regime of Islands in International Law.*

proportion to the width of its mouth as to contain land-locked waters and constitute more than a mere curvature of the coast." (Report, p. 19).

Mississippi argued that inasmuch as the Sound met the semi-circle test[7] based on the total length of the closing lines connecting its natural entrance points, it fulfilled the requirements of a juridical bay. In rejecting the State's argument, the Master in a somewhat perplexing passage stated:

> The Court appears to have settled this point in *United States v. Louisiana, supra,* where it says:
>
> > We cannot accept Louisiana's argument that an indentation which satisfies the semi-circle test ipso facto qualifies as a bay under the Convention. Such a construction would fly in the face of Article 7(2), which plainly treats the semicircle test as a minimum requirement. And we have found nothing in the history of the Convention which would support so awkward a construction. 394 U.S. at p. 54. (Report, p. 19).

The Master observed that in that circumstance and with little authority to assist him in adjudicating the questions, he was constrained to rely largely upon subjective criteria. (Report, pp. 19-20). The dilemma appears to result from an overly broad reading of the above quoted passage from this Court's opinion out of its proper context.

One of the areas in dispute in *United States v. Louisiana,* 394 U.S. 11 (1969), was East Bay, a V-shaped bay

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7. Application of the semi-circle test subsumes the existence of natural entrance points for identifying the area of the indentation under Article 7(3). See discussion of natural entrance points, *infra.*

in the Mississippi River delta. Initially the Court pointed out:

> Since East Bay does not meet the semicircle test on a closing line between its seawardmost headlands . . . it does not qualify as a bay under Article 7 of the Convention on the Territorial Sea and Contiguous Zone.

It was noted, however, that a line could be drawn within East Bay which would satisfy the semi-circle test. Louisiana argued by analogy that just as under Article 7(5) a 24-mile line can be drawn within a bay whose mouth is more than 24 miles wide so could a closing line be drawn within an indentation whose mouth was too wide at its seawardmost headlands so as to enclose the greatest possible area. The United States objected to the closing line selected by Louisiana. It argued that the area which Louisiana sought to enclose within East Bay did not constitute a bay because there was no "well-marked indentation" with identifiable headlands enclosing "landlocked waters". The United States further argued that there was not the slightest curvature of the coast at either asserted entrance point selected by Louisiana.

The Court stated:

> We do not now decide whether the designated portion of East Bay meets these criteria, but hold only that they must be met. (*United States v. Louisiana, supra,* p. 54).

Thus the conclusion of the Court appears to have been *obiter dictum* intended for the guidance of the Special Master in subsequent proceedings.

Properly understood, the Court's comments related not to the effect of the semi-circle test, *per se,* but rather to the proper selection of "natural entrance points". Only by

the identification of natural entrance points is it possible to apply the semi-circle test. The indentation to be compared to the semi-circle is defined in terms of the line connecting the natural entrance points and the low-water mark around the shore of the indentation. Thus, if natural entrance points are established which meet the semi-circle test, the *traveaux preparatoires* to Article 7 indicates that the area should be considered a bay. This is not to suggest that a closing line for a bay may be drawn without regard to the location or existence of natural entrance points, for so awkward a construction would be clearly at variance with the precise language of Article 7(3).

The State of Mississippi submits that the language relied upon by the Special Master requires careful analysis in terms of "natural entrance points". When this is done, it is apparent that Mississippi's interpretation of the function of the semi-circle test is in full accord with this Court's comments regarding East Bay. Moreover, Louisiana was unable to direct the Court's attention to anything in the Convention supporting its st ained argument. Mississippi, on the other hand, relies upon the plain language of Article 7 and replete references to the history of the Convention. The touchstone for understanding the terms "well-marked indentation," "mere curvature," and "landlocked waters" is the concept of "natural entrance points" in conjunction with the semi-circle test. In this context, the semi-circle test provides technical verification of the vague and imprecise geographic conditions described in Article 7(2).

The correctness of Mississippi's construction of Article 7 is confirmed not only by the plain language and history of the Convention, but by the absurd consequences which would otherwise result. The Special Master, believing himself foreclosed from a simpler and more precise analy-

sis, viewed Article 7(2) as establishing separate subjective requirements different from the assistance provided by the semi-circle test. His approach ignores the repeated insistence of the drafters of the Convention for giving precision to the definition of "bay" by providing a technical formula for verifying the existence of a bay. The *traveaux preparatoires* discussed earlier makes clear the semi-circle test was intended to establish the proportion between a bay's penetration and width of the mouth. The semi-circle test provides a mathematical relation between the width of the mouth of an indentation and area of the indentation. If this relation is met, the bay is landlocked; if not, it is a "mere curvature" and part of the open sea.

The Master having determined the Sound met the semi-circle test (Stipulation No. 9) proceeded to calculate a ratio of depth of penetration to width of the closing line. Based upon that ratio (.4167:1) he subjectively concluded Mississippi Sound constituted more than a "mere curvature" of the coastline. (Report, pp. 9-20).

In an attempt to give content to the term "landlocked," the Special Master found the ratio of the combined lengths of the barrier islands exceeded 50% of the length of the bay and was therefore sufficient to enclose landlocked waters.

Quite apart from the fact that the Master's construction of Article 7 required him to calculate at least three separate mathematical ratios, it relegates the semi-circle test to added baggage within the Convention with no apparent purpose but to impose another restriction. Mississippi agrees with the Master's ultimate conclusions, but it submits that his interpretation of the requirements of Article 7 are unduly complicated, ignoring the admonitions of the drafters of the Convention and the *traveaux*.

B. Natural Entrance Points.

The terms "well-marked indentation" and "land-locked waters" are implicitly tied to the concept of "natural entrance points" employed in Article 7. Article 7(3) of the Convention provides:

> For the purpose of measurement, the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water marks of the natural entrance points. Where, because of the presence of islands, an indentation has more than one mouth the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation shall be included as if they were part of the water area of the indentation.

The concept of a "juridical bay" is a *lex specialis*, a special law defining the term for specific purposes. Article 7(2) begins by stating: "For the purposes of these articles, a bay is . . . ." It directs our attention to the specialized meaning given to the term "bay" set forth in the text, and indirectly to cautions against relying on any preconceived notions which have not been included in Article 7.

The Convention in its choice of language quite explicitly departs from the concept of mainland headlands, replacing it with the more functional "natural entrance points". In doing so, the Convention reflects a clear rejection of the idea that there is a single geographic configuration for a bay.

In his treatise on bays, Commander Strohl states in reference to the term "natural entrance points":

> In the history of the law of bays and its codification, this is a new term . . . it was used in the opinion in

> *United Kingdom v. Norway.* Other and older terms which have been used are mouth of the bay, headlands, or inter fauces terrae (sometimes called inter faucer terrarum). (*International Law of Bays* (1963), pp. 68-69).[8]

Section 2 of Amador's text for Article 7 submitted to the Seventh Session of the ILC in 1955 provided:

> The closing line of a bay shall be drawn between the natural geographic entrance points where the indentation ceases to have the configuration of a bay. (Y.B. ILC, 1955, Vol. I, p. 206).

As the Commission reports indicate, the concept of "natural geographic entrance points" was also taken from the United Kingdom's conclusions in the *Anglo-Norwegian Fisheries Case.* The Commission observed:

> That definition [of natural geographic entrance points] had been implicitly recognized by the International Court of Justice and tallied with historical tradition, which considered the waters of a bay as being those which were enclosed within the line *inter fauces terrarum.* (Y.B. ILC, 1955, Vol. I, p. 207).

The International Court of Justice in its opinion had recognized that waters between islands or islands and the mainland lay "inter fauces terrarum". (ICJ Reports, p. 130). The basic issue before the Court was whether the closing

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8. In an accompanying note to the text, Strohl discourages equating "natural entrance points" with "headlands". In this context he states:

> Its name [headlands] is applied to a particular doctrine or school of thought on bays, Chs. 4 and 5 below. For purposes of present usage, the term 'headland' is not satisfactory since to the mariner it connotes a precipitous cape or promontory. (*The International Law of Bays* (1963), p. 69).

lines between islands or islands and the mainland should be limited by a ten mile rule for bays and whether the water areas should be sufficiently enclosed as to contain landlocked waters.

In its Reply Brief, the United Kingdom explained its position regarding the effects of islands:

> The evidence [of State practice] also points to a general recognition of the fact that coastal islands, particularly islands at the mouth of an indentation, may, by their particular position and configuration in relation to the coast, actually enclose areas of sea within the frontiers of the coastal state. In the latter case the enclosed waters are regarded as in effect a *bay, the arms of which instead of being a solid line of land are a broken line of islands.* . . . That is a very different principle from recognition of sovereignty of an archipelago regardless of whether the sea can properly be said to be enclosed by the configuration of the islands. (*Pleading, Oral Arguments, Documents, Fisheries Case* (*United Kingdom v. Norway*), Vol. II, Para. 149, pp. 545-46). [Emphasis supplied].

The United Kingdom's position is clear recognition of the influence of islands in establishing the existence of a bay. The reference to "natural geographic entrance points" in Paragraph (7) of the British conclusions was deemed equally applicable to islands as to the mainland.

After the International Law Commission's draft of Article 7 was referred to the First Committee of the United Nations Conference on the Law of the Sea, the United Kingdom submitted a proposed amendment, which the Conference report indicates supplied more precise technical terms for the draft version. (U.N. Conf. LOS, *Official Records*, 1958, Vol. III, pp. 145, 227-28). One of

the amendments was adopted as Article 7(3) of the Convention. It provided in part:

> For the purpose of measurement, the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water marks of its natural entrance points.

The amendment was intended to amplify the meaning of Article 7(2) by defining an indentation in terms of the area it occupies for comparison under the semi-circle test. Prior to the amendment, nothing in Article 7 precisely and expressly identified the extent of the indentation.

Article 7(3) defines the area of an indentation as the waters enclosed between the low-water mark around the shore of the indentation and a line joining the "natural entrance points". The line connecting these natural entrance points forms the "mouth" or entrance to the indentation. Where islands create multiple mouths, the lines joining the natural entrance points are added together for making the computations for the semi-circle test. Article 7, therefore, quite implicitly recognizes the fact that natural entrance points may be located on islands.

In this respect, this Court in *United States v. Louisiana, et al.*, 394 U.S. 11 (1969), held:

> There is no suggestion in the Convention that a mouth caused by islands is to be located in a manner any different from a mouth between points on the mainland—that is by 'a line joining the low-water marks of its natural entrance points.'

The Court further observed:

> Article 7(3) clearly distinguishes between islands which, by creating multiple mouths, form a part of the

> perimeter of the bay, and those which, by their presence wholly 'within' the bay, are treated as a part of its waters. (p. 60).

Article 7(3) provides the basic definition of an indentation necessary for determining whether the waters are landlocked and well-marked. The term "well-marked" in Article 7(2) refers to indentations, the mouths or entrances of which are discernable or identifiable, a point of obvious importance to mariners and cartographers in the absence of authoritative charts. The Special Master concluded that a "well-marked indentation" is one which has clearly distinguishable "natural entrance points". Professor Bowett conceded that natural entrance points assist in determining whether an indentation is "well-marked" by defining where it starts and stops. (TR. 1863). Islands which provide more than one mouth or entrance to an enclosed body of water and therefore multiple natural entrance points may serve to "well-mark" the indentation. The semi-circle test further confirms the "well-marked" character of the waters and establishes their landlocked character.

The United Kingdom argues that islands are taken into consideration under Article 7 only for purposes of measurement of the semi-circle test and the length of the closing line, and then only where islands are deemed to lay in the mouth of a pre-existing bay.

This Court has previously rejected such a construction of Article 7. In *United States v. Louisiana, supra,* the Court stated:

> While the only stated relevance of such islands is to the semi-circle test, it is clear that lines across the various mouths are to be baselines for all purposes. (p. 55).

Similarly, while the area of an indentation is defined for the stated purpose of comparison under the semi-circle test, it is patent that the term "area" so defined also applies to the "indentation" referred to in Article 7(2). The precise language of Article 7(3) is especially pertinent to the inquiry. That section provides:

> Where because of the presence of islands, *an indentation has more than one mouth*. . . . [Emphasis supplied].

The language makes it patently clear that an island which forms the mouth to an indentation cannot be considered to be "in" the mouth of a bay.

C. Coasts of Islands.

The United States argues that despite the language of the Convention and its *travaux* islands may not be taken into consideration in delimiting the area of an indentation under Article 7(3) unless the mainland without regard to the islands would qualify as a bay. Under this interpretation, the only effect of islands would be to reduce the width of the bay for purposes of the 24-mile closing line.

Article 7, it is asserted, defines bays as indentations in the "coast," a term contrasted with "islands". Mississippi contends that nothing in the Convention or Article 7 in particular supports the Government's position. To the contrary, it submits that the language of the Convention, its *travaux*, and the construction given it by the United States confirms *its* position.

The United States concedes as it must that islands have their own baselines and territorial sea measured in

the same manner as that of the mainland. (*n.b.* Article 10 and Article 3). An island it is said may therefore have its own bays. (See *Brief of United States,* p. 61 in *United States v. Louisiana,* 394 U.S. 11). Nevertheless, the Government now takes the position that the terms "coast" and "island" are somehow antithetical. The inconsistency of the United States' position is apparent. On the one hand it asserts that bays are indentations within the mainland and that islands may not be considered in establishing the requirements of Article 7(2) unless they are considered extensions of the mainland. On the other, it recognizes that islands may have their own bays, *i.e.* that bays may be formed by islands.

Article 10 directs that the baseline of an island shall be drawn in accordance with the provisions of the Convention. By reference, Article 3 defines the baseline of an island as the "low-water mark along the coast."

In this context there is no contradiction between the terms "coast" and "islands". The term "coast" is a geographical term applicable to both islands and the mainland. It represents the line of contact between the land and a body of water. The Convention and its *traveaux* make clear beyond doubt that "coast" was not to be contrasted with "islands".

> Article 1 of the Convention provides:
> The sovereignty of a state extends beyond its land territory and internal waters to a belt of sea adjacent to its coast, described as the territorial sea.

Article 3 further states:

> Except where otherwise provided in these articles, the normal baseline for measuring the territorial sea is the low-water line *along the coast* as marked on

large-scale charts officially recognized by the coastal state.[9] [Emphasis supplied].

At the Forty-fifth meeting of the First Committee of the United Nations Law of the Sea Conference held on April 12, 1958, Sir Gerald Fitzmaurice introduced the United Kingdom's amendment to the ILC's text for Article 4 (subsequently Article 3 of the Convention). The amendment substituted the phrase "articles 5 and 7" for "article 5 and to the provisions regarding bays and islands" in the ILC draft. He explained the amendment by stating that while islands were mentioned in Article 10, that article did not provide for a delimitation of the territorial sea of an island which was in any way different from that applied in the mainland. (U.N. Conf. LOS, 1958, Vol. III, pp. 139 and 227).[10]

During the same session the United States also introduced an amendment to draft Article 4 for the stated purpose of "improving the drafting of the article." (U.N. Conf. LOS, 1958, Vol. III, p. 140). The amendment changed the heading and text to read as follows:

Mainland baseline

Article 4

Subject to the provisions of the present rules, *the baseline is the low-tide line on the mainland.* The

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9. Article 4 (Normal baselines) of the draft convention prepared by the International Law Commission (ILC) provided: "Subject to the provisions of Article 5 [straight baselines] and to the provisions regarding bays and islands, the breadth of the territorial sea is measured from the low-water line along the coast. . . ." (Y.B. ILC, 1956, Vol. II, p. 257).

10. The ILC text for Article 10 (Islands) provided: "Every island has its own territorial sea. An island is an area of land, surrounded by water, which in normal circumstances is permanently above the high water mark." (Y.B. ILC, 1956, Vol. II, p. 270).

> baseline shall be marked on large-scale charts officially recognized by the coastal state. [Emphasis supplied].

In the accompanying commentary to its proposed amendment, the United States stated:

> (b) The title 'mainland baseline' is suggested because this is the proper scope of the article. Baselines on islands and drying rocks and shoals are covered in articles 10 and 11.
>
> * * *
>
> (f) The word *'coast'* in the second clause is undesirable, since the term *was interpreted to include islands and drying rocks and shoals by the International Court of Justice in the Fisheries Case* (Judgment of 18 December 1951, I.C.J. Reports, 1951, p. 127). *Such a construction would give an unintentionally wide scope to the draft article.* (U.N. Conf. LOS, 1958, Vol. III, p. 236). [Emphasis supplied].

It is significant that Article 10 (Islands) referred to in the amendment did not mention any method for determining the territorial sea aside from Article 4 which provided that the "baseline of the territorial sea was to be measured from the low-water line along the coast."[11]

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11. In its discussion of low-tide elevations (Article 11) in its Brief in *United States v. Louisiana,* 394 U.S. 11 (1969), the United States based its argument in part upon this very proposed amendment for Article 4 and the comments. It stated:

> Thus, on March 29 the United States explained at some length that it considered 'Mainland baseline' to be the best caption to indicate that Article 4 did not include water crossings or *island baselines.* (Brief of the United States, p. 8). [Emphasis supplied].

However, the United States fails to indicate that the amendment was rejected by the drafting committee. Likewise, it fails to

(Continued on following page)

The Yugoslavian representative, Mr. Katicic, took issue with the American proposal pointing out that it involved a point of substance insofar as it referred to "the low-tide on the mainland" and that it made no reference to islands, whereas the ILC's draft referred to "the coast," thereby covering both mainland and islands. (U.N. Conf. LOS, 1958, Vol. III, p. 140).

Further consideration of Article 4 was postponed until the Fifty-second Meeting on April 17, 1958. At that time, Yugoslavia had submitted a proposal regarding Article 10 (Islands) three (3) days before the United States' amendment for the same article. The Yugoslavian proposal suggested a second paragraph for the Article which provided: "The provisions of Article 4 [Normal Baselines] and 5 [Straight Baselines] also apply to islands."[12] (U.N. Conf. LOS, 1958, p. 227). The Yugoslavian proposal was approved by a vote of 47 to 1 with 7 abstentions.

The comment accompanying the United States' proposed amendment to Article 10 stated:

> The statement by the International Law Commission that 'every island has its own territorial sea' fails to indicate where the baseline of an island is located. The outer limit of the territorial sea around islands, as is true in the case of all land masses, is determined

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Footnote continued—

quote subparagraph (f) regarding the general understanding of the meaning of the word "coast". (See discussion *infra*). The retention of the language of draft Article 4 in Article 3 of the Convention in face of the pointed objections of the United States indicates that the Conference was well aware of the broad scope of the term "coast" and that it should apply equally to islands as to the mainland.

12. The Yugoslavian proposal recognized that there is no inconsistency between the terms "islands" and "coast" or that bays under Article 7 are to be limited to indentations in the mainland alone.

by the provisions of Article 6. (U.N. Conf., pp. 161-63).[13]

Mr. Ruedel on behalf of the French Government pointed out to the United States that the ILC had made adequate provision for baselines of islands by employing the flexible expression "along the coast" in Article 4. He further stated that the most defective text in that respect was the United States delegation's own proposal that the baseline was the low-tide line "on the mainland." (U.N. Conf., p. 163).

The American amendment for Article 4 was submitted together with those of other governments for consideration by the drafting committee. The final text of Article 4 as adopted by the First Committee implicitly rejected the United States' proposal in favor of the Yugoslavian proposal. That text became Article 3 of the Convention on the Territorial Sea and Contiguous Zone.

From this brief review of the *traveaux* it is apparent that the drafters and delegates did not consider the terms "coast" and "islands" mutually exclusive. Neither did the Convention nor international law require islands be ignored in determining the existence of an indentation under Article 7.

III. MISSISSIPPI'S ACT OF ADMISSION CONFIRMS THE STATE'S TITLE TO MISSISSIPPI SOUND.

Mississippi contends that it owns the submerged lands of the Mississippi Sound by virtue of the cession made in its Enabling Act and that its title and ownership is con-

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13. Article 6 provided, "The outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea."

firmed by the Submerged Lands Act, 43 U.S.C. §1301, *et seq.* and secured by Article IV, Sections 3 and 4 of the Constitution of the United States.

Congress in enacting the Submerged Lands Act recognized, established, and confirmed in the States the title and ownership of submerged lands beneath navigable waters within the boundaries of the respective States. 43 U.S.C. §1311(a). The term "boundaries" is defined by the Act to include ". . . the seaward boundaries of a state or its boundaries in the Gulf of Mexico or any of the Great Lakes . . . as heretofore approved by Congress, or as extended or confirmed pursuant to section 4 [43 U.S.C. §1312]." The Act provides that the terms "boundaries" and "lands beneath navigable waters" should not be interpreted as extending more than "three marine leagues into the Gulf of Mexico." 43 U.S.C. §1301(b). Section 4 of the Act, 43 U.S.C. §1312, expressly preserves any State's boundary beyond three miles ". . . if it has been heretofore approved by Congress." In admitting Mississippi to statehood, Congress established its southern boundary along the Gulf side of the barrier islands, thereby providing the "approval" recognized by the Submerged Lands Act.

The Special Master concluded that he was foreclosed from finding Mississippi's Enabling Act[14] *on its face* estab-

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14. In Mississippi's Enabling Act of March 1, 1817, Congress provided that the new State should:

> *consist of all the territory included within the following boundaries,* to wit: Beginning on the river Mississippi at the point where the southern boundary line of the state of Tennessee strikes the same, thence east along the said boundary line to the Tennessee river, thence up a direct line to the north-west corner of the county of Washington, thence due south *to the Gulf of Mexico, thence westwardly, including all the islands within six leagues of the shore,* to the most eastern junction of Pearl River with Lake Borgne . . . . [Emphasis supplied].

lishes the southern boundary of the State as the southern coast of the barrier islands. (Report, pp. 33-34).[15] In Reaching that conclusion, the Master referred to the Court's discussion of Louisiana's boundary description in *United States v. Louisiana*, 363 U.S. 1 (1960):

> And while 'all islands' within three leagues of the coast were to be included, there is no suggestion that all waters within three leagues were to be embraced as well. In short, the language of *the Act evidently contemplated no territorial sea whatever.* (363 U.S. at pp. 67-68). [Emphasis supplied].

The Court referring to Mississippi's boundary description stated:

> We have already held with respect to Louisiana's claim to a three league maritime boundary that an Act of Admission which refers to all islands within a certain distance from the shore does not appear on its face to mean to establish a boundary line that distance from the shore, including all waters and submerged lands as well as all islands. There is nothing in Mississippi's history, just as there is nothing in Louisiana's to cause us to depart from that conclusion in this instance. (363 U.S. at p. 8).

A careful review of the claims of Louisiana and Mississippi at that stage of this litigation is helpful in understanding the issue.

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15. Likewise, the Master believed that finding foreclosed any application of Section 4 of the Submerged Lands Act, (43 U.S.C. §1312) which provides, *inter alia*:

> Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress.

In *United States v. Louisiana*, 363 U.S. 1 (1960), Gulf Coast States were attempting to establish claims in the Gulf in excess of the minimum three miles approved by the Submerged Lands Act. Louisiana claimed the phrase "including all islands within three leagues of the coast" in its Act of Admission confirmed its seaward boundary three leagues from its coast in effect conveying a three league belt of territorial seas. The United States argued that the boundary language encompassed only those offshore islands lying within that limit and not all waters within three leagues of the coast *where no islands existed.* Although the United States denied that the boundary language described any water areas between islands and the mainland, it conceded as follows:

> It happens that all the islands on the coast of Louisiana are so situated that the waters between them and the mainland are sufficiently enclosed to constitute inland waters; consequently the lands underlying those waters necessarily passed to the State upon its entry into the Union. *Pollard v. Hagan*, 3 How. 212. (Brief of the United States in Support of Motion for Summary Judgment on Amended Complaint, p. 177).[16]

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16. The United States' position at that stage of the litigation is an anomally of logic and reason. On the one hand, it appears to have denied that Louisiana's boundary language incorporated offshore islands *and* the intervening waters. At the same time, it also asserted that the waters between the mainland and offshore islands were internal waters which passed to the state on admission. It cited *Pollard* in support of its position. *Pollard*, however, recognizes state ownership of navigable waters *within state* boundaries, not waters beyond those boundaries. The United States' argument would have required the Court to recognize two types of inland waters, those within state boundaries and those outside those boundaries which were retained by the United States. This situation would certainly have been a novel interpretation inasmuch as it has always been presumed that federal claims began only where the internal waters end, with the individual States holding the title to inland waters.

In its discussion of Mississippi's boundary description, the United States made a similar concession relating to Mississippi Sound. It stated, *inter alia*:

> As in the case of Louisiana (*supra*, p. 177), we need not consider whether the language 'including the islands' etc., would of itself include the water area intervening between the islands and the mainland (though we believe that it would not) . . . . *Thus, the only practical issue between the United States and Mississippi is whether the statutory expression 'including all islands within six leagues of the shore,' described a water area (containing no islands), extending more than three miles seaward of the outermost island off Mississippi.* (Brief for United States, Exhibit J-8, p. 254). [Emphasis supplied].

The Court noting these concessions stated:

> The Government concedes that all the islands which are within three leagues of Louisiana's shore and therefore belong to it under the terms of its Act of Admission, happen to be so situated that the waters between them and the mainland are sufficiently enclosed to constitute inland waters. Thus, Louisiana is entitled to the lands beneath those waters quite apart from the affinitive grant of the Submerged Lands Act, under the rule of *Pollard's Lessee v. Hagan*, 3 How. 212. (363 U.S. 67).

Implicit in the Court's conclusion under *Pollard* is the finding that waters lying between Louisiana's offshore islands and the mainland were in fact "navigable waters *within* the territorial boundaries" of the State. By subsequent reference, the Court applied its analysis to Mississippi. (363 U.S. 82, n. 135).

Mississippi's Enabling Act (1817) describes the boundary line of the State in carefully chosen language and provides that the territory within those boundaries belongs to the State. The southern boundary line is described as extending to the Gulf of Mexico and "including" all islands which may be within six (6) leagues of the shore. It is significant that the Act defines the territory of the State as that "within" the prescribed boundaries and then proceeds to detail the specific boundary line which forms the perimeter of the state. The southern boundary is drawn so as to include or enclose all islands within six (6) leagues of the shore. Since no islands lie seaward of the Mississippi barrier islands, those islands formed the southern boundary of the state under its Enabling Act. *Louisiana v. Mississippi*, 202 U.S. 1, 46-47 (1905). Mississippi Sound is within the boundaries so described and therefore constitutes a part of the territory of Mississippi.

In the present proceedings, the United States has receded from its previous concession regarding Mississippi Sound as inland waters.[17] The Special Master assumes for the sake of his analysis, but without deciding the question, that the United States is not bound by its previous con-

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17. Although the Executive Branch has now abandoned its previous position that Chandeleur Sound is inland waters, it has entered into a stipulation with Louisiana that the State is entitled to the submerged lands underlying the Chandeleur Sound. (See Stipulation Exhibit No. J-119). Under the circumstances set forth in the stipulation, the Executive Branch recognizes Louisiana's exclusive right to the lands underlying the Chandeleur and Breton Sounds, while at the same time denying any claims to the area as inland waters.

The stipulation with Louisiana can be supported only by a finding by the Court that the Chandeleur Islands form the State's coastline, thereby making the waters landward of the islands internal. Mississippi contends that the only instances in which Congress may have approved a cession of Chandeleur and Breton Sounds to Louisiana are its Act of Admission (1812) and the Submerged Lands Act (1953).

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cession. (Report, p. 32). Mississippi has shown that the concession respecting Mississippi Sound was made after careful consultation among the Departments of the United States and reflects the United States policy at that time. (See Report, pp. 39-44, 47-54). The Court in relieving the United States of its concession noted, *inter alia*:

> Louisiana has not relied to its detriment on the concessions which appear to have been made primarily for purposes of reaching agreement on the leasing of the submerged lands pending a final ruling on their ownership. The Interior Agreement of 1956 specifically recognized that neither party would be bound by its position. (394 U.S. 11, 73, n. 97).

Moreover, the Court further noted that the concession *did not include* as inland waters the particular section of the Louisiana coast before the Court, *i.e.* "Isle au Breton Bay."

Footnote continued—

Jonathan I. Charney of the Justice Department, in a letter dated June 6, 1972, stated that despite the stipulation with Louisiana regarding Chandeleur Sound:

> No such stipulation or reliance has taken place with respect to the rights of Mississippi and Alabama in Mississippi Sound and, if pressed, I would assume we would take the position that the limit of the States' rights is the 3-mile limit shown of the Task Force Documents. (Exhibit M-101).

Such discrimination between the rights of two adjoining States is manifestly unjustified. Congress in admitting the States to the Union has assured them of an equality of treatment at the hands of the Federal Government. This fundamental concept of fairness or "equal footing" among the States has been held to include political rights and matters of sovereignty, including property rights, to submerged lands. (*U.S. v. Texas*, 339 U.S. 707 (1950)). To permit the Executive Branch to exercise the discretion to determine property rights of the United States and individual states on the basis of political expediency or litigation strategy especially where underlying facts are disputed would be to give the Executive Branch a prerogative expressly reserved to Congress.

Mississippi's situation is quite different. It was joined as a party subsequent to June 24, 1957. (*U.S. v. Louisiana*, 354 U.S. 515 (1957)). Prior to that time Louisiana was the sole defendant in the proceeding. Consequently, Mississippi was not a party to the 1956 Interim Agreement between the United States and Louisiana, nor did it enter into any agreement with the United States for leasing submerged lands. While the agreement with Louisiana expressly provided neither party would be bound by the so-called Chapman Line along the Louisiana coast, no such line was ever depicted along the Mississippi coast, nor did the United States express any reservations with respect to Mississippi Sound as inland waters. It is significant that the concession which the United States now seeks to withdraw involved the very same area now in dispute.

Mississippi submits that the plain language of Mississippi's boundary description is confirmed by reference to extrinsic evidence. (See *Missouri v. Kansas*, 313 U.S. 78 (1909)). Inasmuch as a substantial portion of the documentary evidence and testimony received by the Special Master related to the location of the State's southern boundary, it is submitted that the matter should be referred to the Master for further findings of fact.

CONCLUSION

For the foregoing reasons the State of Mississippi respectfully submits that the Special Master's recommendations be accepted and adopted by this Honorable Court based on the prior findings as well as the alternative theories advanced herein, the Motion of the State of Mississippi granted, and a supplemental decree be entered in accordance therewith and that the Cross-Motion of the United States be denied.

Respectfully submitted,

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